SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-470

PHYLLIS B. HETRICK - - - - Petitioner

versus

ROBERT R. MARTIN, President of Eastern Kentucky University, and
THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY - - Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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v.

ROBERT R. MARTIN, President of Eastern Kentucky University, and
THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion delivered by the Court of Appeals for the Sixth Circuit was entered June 15, 1973, but has not yet been officially reported. The opinion is copied in the Appendix to the Petition for a Writ of Certiorari at page 1a. The decision for the United States District Court for the Eastern District of Kentucky is not officially reported, but its Memorandum Opinion, Findings of Fact, and Conclusions of Law are appended to the Petition for a Writ of Certiorari at pages 17a,

11a, and 15a respectively. The opinion of the United States District Court for the Eastern District of Kentucky denying defendants' motion to dismiss is officially reported at 322 F. Supp. 545 and appended to the Petition for Writ of Certiorari at page 21a.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional Provision Involved are set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Administration of a Public University May, Consistent with the First and Fourteenth Amendments, Fail to Renew a Nontenured Teacher Because her "Teaching Methods," "Educational Philosophy," and "Pedagogical Attitudes" are Considered Inappropriate by her Superiors?

COUNTERSTATEMENT OF THE CASE

A counterstatement by Respondents might be unnecessary except for what would appear to be a carefully contrived misrepresentation on pages 9 and 10 of Petitioner's statement of the case, which is as follows (emphasis added):

> "The District Court *found* that the *reasons* advanced by Dr. Thurman and the University officials were 'largely superficial' and that the alleged inadequacies on the part of the petitioner were 'easily correctable.' "

The District Court did not, of course, make any such finding. The apparent source of Petitioner's misstatement is the following observation appearing in the District Court's opinion (pp. 18a and 18b of the Petition for Certiorari):

> "Although the court is *inclined to believe* that the classroom inadequacies that Dr. Hetrick was alleged to have displayed . . . were largely superficial and thus easily correctable, it is not the duty of the court to evaluate the wisdom of the University's decision not to renew the contract." (Emphasis added.)

There is, it seems to Respondents, a gross difference between a passing comment to the effect that the teacher's *inadequacies* were superficial and easily correctable and a finding that the *University's reasons for not renewing her contract* were superficial. The pertinent facts upon which the decisions of the District Court and the Sixth Circuit are excellently set forth in the opinion of the Sixth Circuit (appendix to Petition for a Writ of Certiorari, pp. 1a-7a).

As this court will readily perceive, the essential finding of the trial court was that the Petitioner had failed to overcome the burden of proving to the satisfaction of the trier of fact the one and only fact she sought to prove and had to prove in order to sustain

a cause of action—that in determining not to renew her contract the administrative officials of the University were motivated by a disapproval of what she had said and done in the exercise of her right of free speech under the First Amendment.

Having thus failed to carry the battle by frontal assault, her posture now is to say that she never really had to fight that battle anyway—that the University simply had no right in the first place to pass judgment on her qualities as a teacher, because, after all, teaching methods, objectives, and philosophies are no business of the University—whatever they may be, they fall within the exclusive, private, constitutionally-protected domain of the individual teacher himself. That is the proposition—the absurd proposition—now laid at the doorstep of this court by the Petition for Certiorari.

ARGUMENT

"Teaching Methods," "Educational Philosophies," and "Pedagogical Attitudes" of a Nontenured Teacher Are Constitutionally Permissible Considerations for a University in Deciding Renewal or Nonrenewal of a Teacher's Contract.

The single thrust of Petitioner's original claim in this case was that her contract was not renewed because she made statements about Vietnam, the draft, and other controversial matters in her Freshman English classes, the consideration of which was violative of her First Amendment Rights. Petitioner failed to satisfy

her burden of proof; the District Court held (Appendix to Petition for Writ of Certiorari, p. 16a):

> "The court is satisfied that the defendants' decision not to renew Dr. Hetrick's contract was based solely upon their concern for her teaching methods and ability. *Whether the University's decision was wise is no importance here, inasmuch as the evidence demonstrates that the decision was not affected by Dr. Hetrick's engagement in First Amendment activities.*" (Emphasis added.)

The Sixth Circuit stated, "* * * We conclude upon examination of the record that the findings of the district court are fully supported by the evidence and that plaintiff was not discharged because of any statements she may have made." (Appendix to Petition for Writ of Certiorari, pp. 6a-7a.)

On appeal to the Sixth Circuit and in her Petition for a Writ of Certiorari, Petitioner deserted her original claim and is now asking this court to declare that the reasons the University had for not renewing her contract amounted to constitutionally forbidden invasions of her freedom to carry out her contractual duties—or not carry them out—in such manner as she alone saw fit. In essence, she espouses a purported rule of law that would reduce school systems to mere paymasters utterly devoid of authority to exercise any judgment with regard to the competence of nontenured faculty members. Her argument is based upon the premise that Eastern Kentucky University is against teaching students how to "think." This assumption is preposterous and is nowhere substantiated in the record.

The purposes of any university are multifold, one of which is, of course, the teaching of students to think for themselves. The basic question here is whether the trained administrators of a university, or a member of the faculty not yet sufficiently experienced even to be entrusted with tenure, is in the rightful position to determine and direct the means by which those purposes may best be achieved. The obvious answer is that academic objectives and methods cannot be left to the discretion of each and every individual faculty member; they must be left to the governing authorities of the University. How else could any standard level of achievement—indeed of education itself—be attained?

The District Court stated:

> "The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A university has the right to require some conformity with whatever teaching methods are acceptable to it." (Appendix to Petition for a Writ of Certiorari, p. 16a.)

And as the Sixth Circuit said, "whatever the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students (cited cases omitted), it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine

whether she has merited tenure status just because her methods and philosophy are considered acceptable somewhere within the teaching profession." (Appendix to Petition for Writ of Certiorari, pp. 8a-9a.)

The evidence pertaining to this matter of "teaching methods" related to Petitioner's teaching of Freshman English classes and one course in Modern Drama. In Freshman English, Petitioner was, in substance, told to stress fundamentals and relate outside topics to English Composition. In the Modern Drama course, the District Court in its Finding of Facts stated (Appendix to Petition for Writ of Certiorari, p. 13a):

> "It was understood by the University that Dr. Hetrick would specialize in teaching Modern Drama, and during her first semester at Eastern she was assigned an upper level course in Modern Drama. Although it appears that Dr. Thurmond had hoped that she would cover 20 plays in that course, her class only studied 11. Dr. Thurmond testified that he felt Dr. Hetrick's performance in her drama class was 'miserable'; that the class was not nearly vigorous enough; and that, under Dr. Hetrick's instruction, it did not compare in work load or degree of difficulty with its companion courses in contemporary novel and poetry."

In regard to Petitioner's approach to teaching, President Martin expressed his general educational philosophy. He testified (TR 274):

> "A. I always had the feeling that you had to know where a student was in his development before you can do a good job of teaching. Now you can overlook that if you will, but your teach-

ing is poorer because of it. Certainly, in education courses we are taught forever that you take the student where he is and develop him from that point, that you can't take him from any other place other than the place where he is in his development.

Q. And it is your position that teachers at Eastern should proceed on the assumption that students come from somewhat restricted backgrounds and are generally unsophisticated?

A. My position is that they ought to understand that we have a wide mix, that we have in the main first generation college students, their mothers and dads have not attended college and it is a very rare one who attends Eastern who comes from a background of that nature and my opinion of it is that certainly should be taken into consideration."

As the Sixth Circuit noted in its opinion, Petitioner's evidence demonstrated that she did not adhere to methods and approaches consistent with the policies expressed by President Martin, the Dean of the College of Arts and Sciences or the Chairman of the Department of English. To the contrary, she emphasized student responsibility and organization of their own topics and time. Respondents submit that certainly such differences are proper considerations in determining whether a nontenured teacher's contract should be renewed. If they are held to be constitutionally impermissible, then what considerations are left which differ from those attributable to tenure? Contrary to Petitioner's limited interpretation of *Board of Regents of State College* v. *Roth,* 408 U. S. 564 (1972), Re-

spondents' understanding of the case is that the very reason for its ultimate holding was the difference in the rights of tenured vis-a-vis nontenured teachers. Respondents agree that the basic issue was whether procedural due process required a notice of reasons and a hearing upon nonrenewal; however, like Wisconsin, Eastern Kentucky University's tenure system creates what amounts to a property interest in employment, the deprivation of which must conform to much stricter constitutional safeguards.

This case was tried after the decision in the *Roth* case, *supra,* and in conformity therewith. As in *Roth, supra,* Petitioner's property interest in employment was created and defined by the terms of her appointment. The contract provided that her employment was for one year beginning September 1969, and ending in June, 1970; it did not provide for renewal absent "sufficient cause."

The Eighth Circuit Court of Appeals in a similar case, *Ahern* v. *Board of Education of the School District of Grand Island* (C.A. 8th), 456 F. 2d 399 (1972), held that a teacher who shifted to students many decisions customarily made by teachers—such as choice of subject for daily discussion and course material—was properly discharged. The court held, "Simply stated, our conclusion is that Miss Ahern was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method, or (2) as phrased by the District Court, 'to teach politics in economics.' "

"Reasons for non-renewal are subtle and at best difficult to articulate and a professor's value depends upon creativity, rapport with students and colleagues, and various other intangible qualities which cannot be measured by objective standards." *Lewis* v. *Chicago State College*, 299 F. Supp. 1357, 1359. The American Association of University Professors in its 1954 Policy stated:

> "* * * Our purpose is to permit the institution, within the limits of academic freedom, the utmost latitude in determining who will be retained for tenure appointments. Becuase the granting of tenure is tantamount to a lifetime commitment, we feel that the institution should be left without a reasonable doubt as to the faculty member's qualifications for tenure before it reaches a favorable decision." (AAUP Bulletin, Spring 1964, p. 85.)

Petitioner, on page 10 of her Petition for a Writ of Certiorari makes the statement, "It must be emphasized again that what is involved here is the meaning of academic freedom at the university level, not at a secondary or elementary school, where perhaps some restraints might be justified because of the relative youth of the students and the difference in function between these schools and universities." Respondents acknowledge some difficulty in comprehending the "difference in function" to which Petitioner refers. They believe it is the prerogative of each university to decide exactly what function it is serving and how best to serve it. Obviously, a regional state university, such as Eastern

Kentucky University, does not serve the same functions as do some of the Nation's largest universities or some of the more prestigous private universities. Students at most regional public universities are at a stage of educational development at which basic courses are needed in addition to courses designed primarily to promote free thinking. The question then becomes, who should make the decision on how best to serve the students—the courts or the universities? Respondents believe such decisions are best made at the university level; otherwise, in each case involving a nonrenewed teacher, the courts will have to review the school's whole academic program.

The question presented, in the University's opinion, is one the Legislature intended to leave to the discretion of the Board of Regents, which is advised by professional educators, and which, by virtue of its familiarity with the institution and the region which it serves, is in a better position to exercise such discretion than the courts. Universities should not be required to staff their faculties with teachers who do not conform to the reasonable requirements of the employer and who do not function as a part of a team striving for the achievement of certain academic goals.

The record in this case does not corroborate Petitioner's contention that an intellectual straitjacket was placed on Petitioner. It does demonstrate that the majority of students at Eastern Kentucky University need basic courses in Freshman English which stress fundamentals. Petitioner's philosophy of teaching students to think for themselves has very little use

(English-wise) in teaching students to construct a proper sentence, paragraph, or even write a decent theme free of grammatical errors. Although no evidence was presented on this issue, Petitioner's theories may be acceptable at some other university; however, Eastern Kentucky University did not think Petitioner was best serving its students. The District Court and Sixth Circuit Court of Appeals felt that conclusion was the rightful prerogative of the University.

This Court has recognized many First Amendment Rights for teachers, the consideration of which is constitutionally impermissible in deciding renewal or nonrenewal of public teachers' contracts. Respondents do not question the holdings in such cases. This court has also recognized that in the absence of constitutional infringement, public employment can be terminated at the will of the employer, *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy,* 367 U. S. 886 (1961). A state may prescribe a curriculum for its public schools, and "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. * * * Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of the school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas,* 393 U. S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 228 (1969).

CONCLUSION

For the foregoing reasons the best interest of Higher Education will be furthered by denial of the Petition for a Writ of Certiorari.

Respectfully submitted,

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